No. 75-1182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner,*

v.

ROBERT FRANCIS, *et al., Respondent.*

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Francis urges that certiorari review is premature or inappropriate because (Opp. p. 2) the "labor law pre-emption" issue was not raised in the Chamber's motion to dissolve the mandatory injunction issued by the District Court (Jt. App. pp. 54a-55a), and this Court previously rejected the Chamber's argument when it summarily affirmed the *Francis I* decision. 409 U.S. 904 (1972). Francis further urges (Opp. pp. 3-4) that if the Chamber's position was before the *Francis II* court, review is "unwise at this time" because "there is substantial likelihood that the HEW regulation involved in this case will be changed in the near future." And finally, Francis contends

(Opp. p. 3) that no important question of federal law is raised by the Chamber's petition.

Each of these contentions not previously discussed in the Chamber's petition will be addressed in Part I of this response. Part II will answer Francis' contentions that the District Court's mandatory injunction is valid, and that Congress is the only forum for resolution of the tension between federal and welfare policies resulting from federal welfare payments to strikers.

I. REVIEW OF THE IMPORTANT ISSUE REMANDED IN SUPER TIRE IS TIMELY

The Court in *Super Tire Engin. Co.* v. *McCorkle,* 416 U.S. 115 (1974) remanded the case to the district court to determine only one question, namely (416 U.S. at 124) "whether Congress, explicitly or implicitly, has ruled out [state and federal] assistance (to persons on strike) in its calculus of laws regulating labor-management disputes." The instant petition presents the Court with the opportunity to rule on this issue, and as we show below there are no procedural or technical infirmities to review.

The Court's summary affirmance of *Francis I* on October 16, 1972, does not bar the instant petition because the Chamber's position presented here was not before the Court at that time. The only party with appeal rights on the merits in *Francis I* was the State of Maryland. Maryland's appeal was limited to the validity of the HEW Secretary's regulations. The Chamber could only appeal the district court's denial of the Chamber's intervention motion (Jt. App. p. 4a, n.7), which the Court dismised "for lack of jurisdiction." 409 U.S. 907 (1972). Moreover, the Court

would not have remanded *Super Tire, supra*, for further proceedings if its *Francis I* affirmance had reached the legislative history arguments raised here by the Chamber. To be sure the Chamber, as *amicus*, was permitted by the *Francis I* court to introduce evidence by affidavit that such payments encourage strikes, and to urge that national labor policy precluded striker eligibility, and the three judge court addressed this issue. (Jt. App. pp. 18a-20a). But because the Chamber had been denied full party status and could not appeal the *Francis I* ruling, neither that decision nor the Court's summary affirmance constitutes litigation of the instant question, or renders those rulings the law of the case.

Francis also errs in contending that the instant issue was not before the *Francis II* court. This same contention was raised in the Court of Appeals and the Fourth Circuit properly rejected it (Jt. App. p. 103). The legislative policy issue presented here was fully litigated and decided by the *Francis II* court. On January 31, 1974 the court granted the Chamber's motion to intervene without limiting in anyway the issues which could properly be raised (Jt. App. pp. 106a-107a). In its Pre-Hearing Memorandum the Chamber urged that Maryland could deny strikers benefits under the amended HEW guidelines because if the District Court agreed, there would be no necessity for reaching the legislative history question (Supp. Jt. App. p. 1a,[1] Jt. App. pp. 115a-116a). In the event the District Court elected to reaffirm its *Francis I*, the Chamber also expressly preserved its

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[1] This portion of the Chamber's Pre-Hearing Memorandum was inadvertently omitted by the printer from the Jt. App.

contention "that the federal collective bargaining scheme precludes the payments to striking employees at issue here." (Supp. App. p. 1a). And during oral argument the Chamber also urged that, if the three judge court reaffirmed its earlier decision it would thereby reach the remanded *Super Tire* issue (Jt. App. 119a-120a). The Chamber was careful not to raise any factual issues because *Super Tire* limited the resolution of the controversy to scrutiny of Congressional intent. More extensive argument by brief or oral argument on this issue was unnecessary and superfluous because as noted above, this issue was fully briefed to the same three judges who had previously indicated their views on this argument in *dicta* in *Francis I*. There can be quarrel over the fact that this so-called labor law issue was before the district court.

The District Court's reaffirmation of its mandatory injunction in its *Francis II* opinion ruled *pro tanto* on the Chamber's contention. Its holding that federal welfare policy authorized striker eligibility for AFDC-UF implicitly reaffirmed and incorporated its holding in *Francis I* that such eligibility was not contrary to or inconsistent with federal labor policy. The text of the District Court's *Francis II* opinion concerns only that portion of the *Francis I* opinion which it desired to change.[2] The court considered it

[2] "Candor requires this Court to state that the language used by this Court in its earlier opinion in describing the three alternatives available to the Secretary does—literally read—permit the amendment promulgated by the Secretary on July 12, 1973. That language could have, and from hindsight should have, included as part of alternative (3) and after the words 'to leave that decision to each state' the additional words 'in accordance with appropriate standards established by the Secretary'." (Jt. App. p. 84a).

unnecessary to republish *in toto* its earlier ruling on the Chamber's contentions, particularly since as indicated by the identical docket number, this proceeding was merely a continuation of the *Francis I* litigation. In these particular circumstances appeal is not dependent upon an express ruling on the Chamber's position which was timely raised before the *Francis II* court. See *Washington Gas Light* v. *Virginia Elec. Power Co.*, 438 F.2d 248, 250-51 (4th Cir. 1971). Thus, the labor law issue is properly the subjet of appeal to this Court.[3]

Nor is there any basis for denying review because the former HEW Secretary Caspar W. Weinberger issued proposed amendments to 45 C.F.R. § 233.100 (a)(1) on August 4, 1975 (Jt. App. 121a-124a). The present HEW Secretary David Mathews has publicly taken the position that any amendments will not be approved while this Court and other federal courts are considering whether Congress intended that strikers should be eligible for benefits under federal welfare or state unemployment compensation statutes.[4] Unlike the circumstances presented in the authorities relied upon by Francis,[5] there is no warrant to withhold judicial action on this petition because there is no probability that new amendments will moot issues decided below. Indeed, denial of review will leave HEW without controlling guidance with respect to

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[3] There is no dispute that the Court of Appeals reached and ruled upon the Chamber's contentions.

[4] *The Wall Street Journal*, April 5, 1976, at p. 4 col. 3; *The Washington Star*, April 7, 1976, at p. A26 col. 3. See Supp. Jt. App. pp. 2a-6a.

[5] *White* v. *Regester*, 422 U.S. 935 (1975); *Richardson* v. *Wright*, 405 U.S. 208, 209 (1972).

HEW's authority to formulate any regulations on striker eligibility. And denial of review will necessitate relitigation of the present controversy regardless of what regulation HEW may ultimately issue.

Even if amendments were to issue, review would still be warranted here because legislative intent must be determined *before* the question of the HEW Secretary's definitional discretion can be reached. *Big Rivers Elec. Corp.* v. *E.P.A.*, 523 F.2d 16, 19 (6th Cir. 1975), *cert. denied,* —— U.S. —— (April 19, 1976) (No 75-774). And since striker eligibility for AFDC-UF benefits has been upheld by the decisions below under *existing* HEW regulations, a challenge to this ruling on the grounds that such eligibility is contrary to legislative intent does not become moot even when the regulations are actually amended. *National Coal Operators Assn.* v. *Kleppe,* —— U.S. ——, 96 S.Ct. 809, 812 n. 4 (1976).

Finally, Francis implausibly argues that the decisions below, which enroll strikers in the AFDC-UF program in the five states within the jurisdiction of the Fourth Circuit without explicit or even implicit Congressional authorization, somehow does not present an important federal question. The Court in *Super Tire* believed an important question had been raised there with respect to the State of New Jersey's practice of awarding both federal and state welfare benefits to strikers. In *Hill* v. *Florida,* 325 U.S. 538 (1944), the interference with national labor policy by one states' reporting requirements for labor organization was deemed sufficient to justify nullification of the state statute. The instant case not only adversely affects the six states which deny AFDC-UF benefits to strik-

ers,[6] but also gives colorable legality to the other 28 states and the District of Columbia which automatically pay strikers these benefits under the AFDC-UF program. See Carney, "A Study of Subsidies for Strikers". Vol. 1973, Wash. U.L.Q. 469, 479 n.49. And this decision may well give impetus to the other 16 states not currently participating in the AFDC-UF program to apply in order to substitute federal money for state funds paid strikers under state unemployment compensation laws.

The nationwide prevalence of strikes and the large number of strikers involved creates demand upon welfare monies of a significant and growing dimension. The widespread state federal subsidies under the AFDC-UF program also creates a substantial federal strike fund of perhaps as much as $62 million per year, which encourages strikes and unfairly gives strikers an unintended advantage in the exercise of economic weapons. To accept Francis' views that federal financing of strikers is *de minimus* on a national scale is to blink at this reality.

The materiality and timeliness of the issue raised by this appeal was underscored in the 1972 Report of the Committee on State Labor Law of the American Bar Association, as follows:

> The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether

[6] Maryland, Oregon, Kansas, Nebraska, Delaware, Pennsylvania.

> the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion.
>
> A.B.A. Sec. of Lab. Law, 1972 Committee Repts., p. 301 (footnotes omitted).

II. THE DECISIONS BELOW WHICH ENROLL STRIKERS IN THE AFDC-UF FEDERAL WELFARE PROGRAM ARE CONTRARY TO FEDERAL WELFARE AND LABOR POLICY

Francis insists (Opp. pp. 4-6) the Court of Appeals properly affirmed the District Court's injunction mandating that striking employees receive AFDC-UF benefits during the time they are on strike. Francis argues initially that the regulations amended by the HEW Secretary are invalid because they fail to create a national definition of unemployment. This argument begs the threshold question whether the Secretary has *any* discretion under the Social Security Act to issue regulations which create express or optional AFDC-UF eligibility for persons, like Mr. Francis, whose need arises solely from the free election to withhold services and strike in support of their union's collective bargaining demands. The Court has ruled that unless Congress has affirmatively indicated eligibility, claimants cannot obtain federal welfare benefits (*Burns* v. *Alcala,* 420 U.S. 575, 580-84 (1975)), and the HEW secretary has no authority *sua sponte* to create such eligibility. "(Executive regulations) are valid only as subordinate rules and when found to be within the framework of the policy which the legislature has sufficiently defined." *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 429 (1935). As we have demonstrated in the Petition, Congress has affirmatively placed strikers outside the reach of the

AFDC-UF welfare program, and expressly indicated in sections 2(3) and 9(c)(3)[7] of the National Labor Relations Act that strikers remain employees of the struck employer.

Francis also argues (Opp. p. 6) that the only appropriate forum for the resolution of the present controversy is Congress. This argument was specifically rejected in *Super Tire Engin. Co.* v. *McCorkle, supra,* where the Court ruled that public support for strikers issue was justiciable within the meaning of the "case and controversy" language of Article III of the Constitution. The Court did not remit Super Tire to the legislative branch of government; the Court remanded the case for further procedings in the federal district court. "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." 416 U.S. at 127.

Francis relies upon the First Circuit's opinion in *Minter,*[8] which held only that Congress might be the "preferable" forum, but by no means the only forum. The same court reiterated in *Grinnell Corp.*[9] that the welfare for strikers issue could be resolved in a judicial forum, and then remanded the case to the district

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[7] Section 9(c)(3) provides:

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

Section 2(3) is set forth at p. 132a of the Jt. App.

[8] *ITT Lamp Div.* v. *Minter,* 435 F.2d 989 (1st Cir.), *cert. denied,* 402 U.S. 933, *pet. for reh. denied,* 404 U.S. 874 (1971).

[9] *Grinnell Corp.* v. *Hacket,* 475 F.2d 449, 453-54, *cert. denied,* 414 U.S. 858 (1973).

court for further proceedings. The Fourth Circuit improperly and erroneously ignored both *Grinnell* and the Court's opinion in *Super Tire* in concluding that (Jt. App. 103a) no tension existed between the payment of federal welfare money to strikers and national labor policy and that if it was wrong, resolution rested with Congress.[10]

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[10] Francis also urges that review is unwarranted because the Chamber has cited no cases declaring that national labor policy pre-empts federal welfare policy with respect to the eligibility of strikers for AFDC-UF. But, the issue raised here is the harmonization of the legislative intent of these federal statutes so that each fully achieve its purpose. A preemption question arises when a state acts unilaterally by statute or policy in an area subject to federal regulation, not, as here, when a state acts under color of *federal* regulations. See *ITT Lamp Div.* v. *Minter, supra*, 435 F.2d at 994: "The activity allegedly intruding into federal labor policy is not solely a state activity but rather a joint state-federal program."

Francis also urges (Opp. pp. 2, 6) that the record is inadequate for proper review. In *Super Tire, supra* the Court posed only one issue, namely Congressional intent as to public support for strikers, and thus further evidence of impact upon the collective bargaining process is unnecessary. This petition presents the answer to this question on analysis of both federal welfare and labor policy. It, however, the Court deems additional evidence relevant on the adverse impact welfare payments has upon the policy of free collective bargaining, a remand to the district court would be appropriate.

CONCLUSION

For the reasons set forth above, as well as those advanced in the petition, it is respectfully submitted that a writ of certiorari to the Fourth Circuit should issue.

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April, 1976

SUPPLEMENTAL JOINT APPENDIX

SUPPLEMENTAL JOINT APPENDIX

IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MARYLAND

Civil Action No. 71-853-K

ROBERT FRANCIS, et al., *Plaintiffs,*

vs.

DAVID T. MASON, et al., *Defendants.*

Pre-Hearing Memorandum for the Chamber of Commerce of the United States of America

Pursuant to Local Rule 9, the Chamber will briefly outline the issues that, it submits, require this Court's consideration: (1) whether the Secretary of H.E.W. has established proper "standards" within which the states may disburse A.F.D.C. benefits; and (2) whether, wholly apart from the disputed standards, the State of Maryland is still free to deny benefits to striking employees pursuant to other provisions of the same statute requiring recipients to accept available work. By arguing only these points, the Chamber does not, of course, waive its arguments previously made to this Court, particularly in light of a recent decision of the Supreme Court in *Super Tire Engineering Co.* v. *McCorkle,* —— U.S. ——, 42 L.W. 4507 (April 16, 1974), viz., that the federal collective bargaining scheme precludes the payments to striking employees at issue here. The Chamber will limit its presentation to the validity of Maryland's policy with regard to any other issues.

1. As this Court has already recognized, Congress delegated the "policy making function" of setting (continued at p. 115a of the Jt. App.)

[The Washington Star, Wednesday, April 7, 1976]

H.E.W. ABSTAINING FROM DISPUTE ON WELFARE PAY

Associated Press

The Department of Health, Education and Welfare said yesterday it will not push forward a proposal to deny welfare payments to strikers while federal courts are considering the question.

The controversy has existed for several years between organized labor and big business.

The AFL-CIO contends that denial of public assistance to strikers would punish innocent women and children. The U.S. Chamber of Commerce and the National Association of Manufacturers argue that welfare payments give union workers an unfair advantage in labor disputes and may actually encourage strikes.

The decision not to intervene in the dispute was made by HEW Secretary David Mathews last December shortly after he took office but was not announced at that time.

[The Wall Street Journal, Monday, April 5, 1976]

HEW SECRETARY SHELVES PROPOSAL TO BAR MOST STRIKERS FROM GETTING WELFARE AID

By Jonathan Spivak, *Staff Reporter of* The Wall Street Journal

Washington—Health, Education and Welfare Secretary David Mathews quietly has shelved a highly controversial proposal that would bar most strikers from receiving welfare benefits.

Mr. Mathews' move may be smart politics, avoiding as it does an explosive issue in an election year. But it merely delays that day when HEW must decide which side it supports in this long-festering controversy between unions and business.

The restriction on welfare benefits to strikers was proposed by HEW Secretary Casper Weinberger just before he left office last year. It would permit payment of welfare benefits only to strikers in states that also permit them to receive unemployment insurance. (Only New York and Rhode Island have such a provision.)

Currently, HEW regulations leave the welfare-striker decision entirely up to the 26 states that give assistance to unemployed workers under the Aid to Families with Dependent Children, or AFDC, welfare program. Nineteen of the 26 states provide benefits to strikers.

Welfare payments to the unemployed will total $750 million in the current fiscal year, ending June 30, about 10% of all AFDC payments. HEW says there aren't any accurate estimates of the amount going to strikers, but some in the past have ranged from $2.5 million to $62 million a year.

The Adversaries' Arguments

The AFL-CIO bitterly opposes the Weinberger proposal on the ground that welfare aid should be based on need alone. Excluding strikers from welfare is punitive and deprives them of assistance when they need it most, organized labor argues. It views the Mathews decision as a tentative victory, although recognizing the fight is far from over.

The Mathews' decision is a setback for the Chamber of Commerce and the National Association of Manufacturers, which have been fighting to limit strikers' access to welfare. They argue payment of benefits during a strike gives workers an unfair bargaining advantage. It allows them to minimize use of their own strike funds, encourages them to hold out longer and even may be a factor in their decision to go on strike, says the chamber. [sic] "We would have liked them (workers) to stop getting AFDC benefits," concedes one chamber expert.

HEW is being pushed to deal with the welfare-striker issue by the courts. A Maryland welfare plan that denied aid to strikers was overturned in federal court in 1972 on grounds that the department had failed to establish standards that would permit exclusion of strikers. At that time, the regulations didn't specifically deal with strikers. HEW then issued new regulations that gave the states the authority to exclude strikers from their AFDC programs.

Still in the Courts

But the Maryland court, and subsequently the Fourth Circuit Court of Appeals again ruled that the HEW didn't establish a valid federal standard for denying aid. The Weinberger proposal, which constituted a dramatic switch in HEW policy was a second effort to meet the court's objections. But the Maryland case is being appealed to the Supreme Court and Mr. Mathews has decided to wait until the court acts before changing the regulations again. It's

an easy way of buying time in one of the toughest controversies he faces.

His decision means that in most of the country, states will remain free to include or exclude strikers from their AFDC welfare programs. Iowa, Kansas, Kentucky, Minnesota, Nebraska and Oregon exclude strikers. But payments will be mandatory in states within the jurisdiction of the Fourth Circuit Court, where just West Virginia and Maryland deny such aid.

The HEW Secretary has been under heavy pressure on the striker issue from both the chamber and the AFL-CIO. The chamber has made elimination of welfare benefits for strikers one of its highest priorities. It has launched a series of legal challenges, not only to payment of welfare, but also to unemployment insurance for strikers. "The most important reason is that public subsidies to strikers interfere with, and eventually could destroy, the collective bargaining concept as the method for labor management negotiations," reasons Richard L. Lesher, chamber president.

Meany Ties Rights to Taxes

The AFL-CIO is equally adamant and has lobbied hard for a HEW regulation that would make payment of benefits to strikers mandatory.

While few members will benefit and the impact on collective bargaining won't be great, the right to payments should be made as a matter of equity, the federation insists. "Workers are taxed to pay the cost of welfare—they should have the same rights as all other citizens to obtain welfare assistance," declares George Meany, AFL-CIO president.

Labor leaders realize that HEW curtailment could set a precedent for restricting other benefits for strikers, particularly food stamps, which have been widely used. They

may also be looking ahead to the possibility of a new federal welfare program, advocated by many politicians, which would broaden AFDC coverage to include many more of their members; currently, most workers are excluded. If so, the unions would want the principle of payment to strikers firmly established.